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CITATIONS

280661—40

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 597

THE TEXAS COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the National Labor Relations Board are reported in 25 N. L. R. B., No. 12.[1] The order of the court below (R. 33–34) was entered without opinion and is not reported.

JURISDICTION

The order of the court below (R. 33–34) was entered on September 28, 1940. The petition for

[1] This is a copy of the decision and order printed in pamphlet form and issued in advance of the bound volume. It is available in the library of this Court. The Board's order is set forth in Appendix A, pp. 11–12, *infra*.

a writ of certiorari was filed on November 27, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (Pet. 4).

QUESTION PRESENTED

The National Labor Relations Board issued a single order against three employers upon a single record made in a consolidated case. One of the employers petitioned for review of the order in the Circuit Court of Appeals for the Seventh Circuit, which could not, under the Act, be vested with jurisdiction to enforce the order against another of the three employers. The Board, believing that proper administration of the Act required consideration of the validity of the order by a circuit court of appeals which could be vested with jurisdiction to enforce the order against all three employers, filed a petition for enforcement against all three employers, together with a certified transcript of record, in the Circuit Court of Appeals for the Second Circuit. No transcript of record was ever filed in the Circuit Court of Appeals for the Seventh Circuit. The question is whether the latter court erred in dismissing, upon motion by the Board, the petition for review filed in that court.

STATUTE INVOLVED

Sections 10 (e) and (f) of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449,

29 U. S. C., Supp. V, Sec. 141, *et seq.*) are set forth in the petition (pp. 11–13).

STATEMENT

The National Maritime Union of America, C. I. O., filed with the Board separate charges against petitioner and two other employers, Cities Service Oil Company and The Pure Oil Company (R. 6–7). The Board ordered the three proceedings consolidated for purposes of hearing (R. 6–7). See National Labor Relations Board, *Rules and Regulations, Series 1, as amended*, Art. II, Sec. 37 (b). Petitioner did not object to the order of consolidation (see R. 2–4, 5–6). Thereafter the Board issued complaints against petitioner and the other two employers (R. 2, 6–7). After further customary proceedings (R. 2–4), the Board on July 3, 1940, issued a single decision in the consolidated proceeding and a single order, running against all three companies (R. 7; pp. 11–12, *infra*). The decision and order were based upon a single record, namely that made at the hearing on all three complaints held pursuant to the Board's order of consolidation (R. 2, 7). The only unfair labor practices alleged in the complaints and found by the Board consisted of the employers' refusals to issue passes to board their ships to representatives of the National Maritime Union, which was the certified collective bargaining representative of the unlicensed personnel on those ships. The Board's order required the three employers to

cease and desist from the unfair labor practices found and, as affirmative action, to grant passes under such conditions and in such number as should be determined by collective bargaining, and to post appropriate notices (*infra*, pp. 11–12).

On August 26, 1940, petitioner filed in the Circuit Court of Appeals for the Seventh Circuit a petition to review and set aside the Board's order (R. 1–6). On August 28, 1940, Cities Service Oil Company presented to that court a motion for leave to intervene in the proceeding initiated by petitioner (R. 7, 18). This motion specifically alleged that Cities Service Oil Company was not engaged in business in any of the States comprising the Seventh Judicial Circuit (pp. 12–13, *infra*);[2] since the unfair labor practices had all occurred outside that Circuit the Board could not file in the Circuit Court of Appeals for the Seventh Circuit a petition for enforcement of its order against that company. See Section 10 (e); R. 7–8, 10, 28–30. The Board, believing that proper administration of the Act required that its order, issued upon a single record, be reviewed in its entirety by a Circuit Court of Appeals having jurisdiction to enforce it against

[2] Subsequently the Pure Oil Company likewise filed a motion for leave to intervene (R. 18). The motions for leave to intervene were omitted from the printed record herein, as were the memoranda filed by Cities Service Oil Company and The Pure Oil Company in opposition to the Board's motion to dismiss the petition for review. We have filed with the Clerk a certified copy of Cities Service's motion. Paragraph XVI of that motion is set forth in Appendix B, pp. 12–13, *infra*.

all three employers, filed a petition for enforcement of the order against the three companies, together with a transcript of the entire record in the proceeding certified by the Board, in the Circuit Court of Appeals for the Second Circuit (R. 10–12, 29–30). Some of the unfair labor practices of each employer occurred within that judicial circuit (R. 11).

On September 6, 1940, the Board filed in the court below a motion to dismiss petitioner's petition for review on the ground that the Circuit Court of Appeals for the Second Circuit was vested with exclusive jurisdiction over the entire proceeding and that the Circuit Court of Appeals for the Seventh Circuit was without jurisdiction further to entertain the petition (R. 6–12). On September 28, 1940, the court entered an order granting the Board's motion and dismissing the petition for review (R. 33–34).

ARGUMENT

The mere filing of the petition for review did not vest the Circuit Court of Appeals for the Seventh Circuit with jurisdiction to review the Board's order; such jurisdiction attaches only upon the filing of the entire transcript of record, certified by the Board. *In the Matter of the National Labor Relations Board,* 304 U. S. 486, 492–493. A transcript of record was never filed in the Seventh Circuit; instead the Board filed a transcript and a petition for enforcement in the Circuit Court of Appeals for the Second Circuit, in which some

of the unfair labor practices of each employer occurred. Thereupon that court acquired "jurisdiction of the proceeding and of the question determined therein," and that jurisdiction was "exclusive." Section 10 (e); see *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.*, 83 F. (2d) 731, 732–733 (C. C. A. 2d); *Hicks* v. *National Labor Relations Board*, 100 F. (2d) 804, 805–806 (C. C. A. 4th). The court below, therefore, correctly dismissed the petition for review.

The present case plainly does not involve, as petitioner contends (Pet. 5–6, 9–10), the hypothetical situation to which this Court referred in *Matter of National Labor Relations Board*, 304 U. S. at 494, that is, a deliberate withholding of the transcript of record by the Board in order to "delay, and perhaps deny, any effective judicial review." The proceeding initiated by the Board in the Circuit Court of Appeals for the Second Circuit afforded petitioner, as well as the other two employers against whom the order ran, as full opportunity for relief against the order as could have been obtained by petitioner in the court below. *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, 369 (see R. 30–32). Thus, petitioner's assertion (Pet. 9) that under the interpretation of the Act implied by the decision below "the Board may in any case refuse to cer-

tify the transcript and thereby prevent an 'aggrieved person' from ever obtaining a review" is entirely unwarranted. There is no indication that the court below would have dismissed the petition for review if the Board had not previously instituted enforcement proceedings in the Circuit Court of Appeals for the Second Circuit. The motion to dismiss was grounded upon the pendency of those proceedings (R. 6–12, 27–33).

Proper and efficient administration of the Act required that only one circuit court of appeals consider the Board's order and the single record upon which it was made, and that that court be one which could be vested with jurisdiction to decree enforcement of the order against all three employers. Plainly, it was not improper for the Board to seek to avoid a situation in which two, or possibly three, circuit courts of appeals would pass upon the validity of the same order, with perhaps conflicting results.[3]

The action of the court below in dismissing the petition for review is in accord with the only other decision under the National Labor Relations Act dealing with a comparable situation. *Stanolind Oil and Gas Co.* v. *National Labor Relations Board,* decided December 14, 1940 (C. C. A. 5th). There the Board issued a single decision and order against Stanolind and its parent corporation, the

[3] ~~Pure~~ Oil Company asserted the desirability of complete review by one court in its motion to intervene (*infra*, pp. 12–13).

Standard Oil Company, upon one record made in a consolidated proceeding. *Matter of Standard Oil Co. (Indiana)*, *Matter of Stanolind Oil and Gas Co.*, 25 N. L. R. B., No. 122. Stanolind filed a petition for review of the order in the Circuit Court of Appeals for the Fifth Circuit and Standard filed a similar petition in the Circuit Court of Appeals for the Eighth Circuit. Neither company was engaged in business within the judicial circuit chosen by the other, and all of the unfair labor practices found occurred within the Tenth Judicial Circuit. Since it was impossible to vest jurisdiction over both companies in either the Circuit Court of Appeals for the Fifth Circuit or the Circuit Court of Appeals for the Eighth Circuit, and no transcript of record having been filed in either of those courts, the Board filed a petition for enforcement and a certified transcript of record in the Circuit Court of Appeals for the Tenth Circuit. The Board then moved the Circuit Courts of Appeals for the Fifth and Eighth Circuits to dismiss the petitions for review; in opposition, the companies advanced, in substance, the contentions made by petitioner here. The Circuit Court of Appeals for the Eighth Circuit granted the Board's motion, holding that the order "is subject to review in not more than one Circuit Court of Appeals" and that it was unnecessary to decide whether the Circuit Court of Appeals for the Fifth Circuit acquired exclusive jurisdiction to review the order

pursuant to Stanolind's petition, filed prior to Standard's petition in the Circuit Court of Appeals for the Eighth Circuit, or whether the Circuit Court of Appeals for the Tenth Circuit had such jurisdiction. *Standard Oil Co.* v. *National Labor Relations Board,* 114 F. (2d) 743, 744 (C. C. A. 8th). Thereafter the Circuit Court of Appeals for the Fifth Circuit also granted the motion to dismiss. *Stanolind Oil and Gas Co.* v. *National Labor Relations Board,* decided December 14, 1940. The court said:

> It is apparent we would not have jurisdiction over the Standard Oil Co. of Indiana and that the Court of Appeals for the Tenth Circuit would have jurisdiction over all parties. The petition to review was filed in this court before the Labor Board filed its proceeding in the Tenth Circuit, but that is immaterial. The record has been filed there by the Labor Board. It would be a needless expense to file a duplicate record here. It would be a useless waste of time to try the case piecemeal. The Court of Appeals for the Tenth Circuit may dispose of the whole matter at one time. To prevent a conflict between two courts of equal dignity in reviewing the same facts it is within our discretion to dismiss the proceeding before us.

CONCLUSION

The petition presents no question of general importance and there is no conflict of decisions; it should, therefore, be denied.

Respectfully submitted.

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DECEMBER 1940.

APPENDIX

A

The order of the Board sought to be reviewed by petitioner in the Court below is as follows:

> Upon the basis of the above findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondents, Cities Service Oil Company, New York City, the Pure Oil Company, Chicago, Illinois, and The Texas Company, New York City, and their officers, agents, successors, and assigns, shall:
>
> 1. Cease and desist from:
>
> (a) Refusing to grant passes to representatives of the National Maritime Union of America in order that such representatives may go aboard the respondents' vessels to meet with the unlicensed personnel thereon;
>
> (b) In any other manner interfering with, restraining, or coercing their employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Grant passes to the duly authorized representatives of the National Maritime Union of America to go aboard their vessels to meet with the unlicensed personnel; such passes to be issued under such conditions and in such number as shall be determined by collective bargaining between each of the respondents and the Union;

(b) Post immediately in conspicuous places on their vessels for a period of at least sixty (60) consecutive days from the date of posting, notices to their unlicensed personnel stating: (1) that the respondents will not engage in the conduct from which they are ordered to cease and desist in paragraph 1 of this order, and (2) that the respondents will take the affirmative action set forth in paragraph 2 (a) of this Order;

(c) Notify the Regional Director for the Second Region in writing, within ten (10) days from the date of this Order, what steps the respondents have taken to comply herewith.

B

Paragraph XVI of the motion for leave to intervene presented by Cities Service Oil Company in the court below (R. 18, 29–30) is as follows:

XVI. That your petitioner is not engaged in business in any of the States of Illinois, Wisconsin, and Indiana; but that the fact that only a single hearing was held and a single record made in the three cases above referred to involving respectively your petitioner, The Pure Oil Company and The Texas Company, said cases having been con-

solidated by the Board itself, is substantially conclusive as to the propriety and desirability of reviewing together at one time the three cases which have been so consolidated by the Board itself, especially in view of Paragraph 2 of Rule 36 of this Honorable Court, joinder being not only "practicable," as mentioned in said Rule 36, but for practical purposes essential.

U. S. GOVERNMENT PRINTING OFFICE: 1940